IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
WRIT PETITION NO.5675 OF 2004

1. Chellaram Jethanand Madhrani
age 64 years, Occ: Business
r/o Bldg No.5, Room No.4
Ramkrishna Coop.Housing Socy.
Bldg., Gulmohar Road No.10
JVPD Scheme, Andheri (W)
Mumbai-49.

And

2. Purushottam Jethanan Madhrani
age 64 years, Occ: Business
r/o Bldg No.13, Room No.6
Ramkrishna Coop.Housing Socy.
Bldg., Gulmohar Road No.10,
JVPD Schemem, Andheri (W)
Mumbai49. .... Petitioners

- Versus -

1. Maruti Raghunath Kadam
age 58 years, Occ. Nil
r/o false address furnished
to Court being Room No.1
ground floor, Mohammed
Yusuf Gardee Charitable Trust
Bldg. Nos.25, 25A, 27 Old
Hanuman Lane, Mumbai 400 002
deceased whose estate is
represented by and who is to
be substituted by his heirs
& legal representatives:

1a. Smt. Kalawati Maruti Kadam

1b. Ms Meena Maruti Kadam

1c. Nitin Maruti Kadam

1d. Ms Seema Maruti Kadam

1e. Mrs. Rekha Madhukar Babar

all adults and legal repre-
sentatives of Respondent No.1 &
1a to 1d reside at B-15, Vishram
Dham, Veena Nagar, Phase II,
LBS Marg, Mulund (West),
Mumbai 400 080, No.1e. reside
at Vishram Govind Society,

Flat No.1, ground floor, A Wing, Virar (East), Dist: Thane.

2. The State of Maharashtra .... Respondents

Shri G.S. Godbole for the Petitioners.
Sarvasri A.A. Kumbhakoni with B.K. Raje and T.D. Deshmukh for the Respondent Nos.1a to 1e.
Shri S.K. Chinchalikar, Asst. Government Pleader, for the Respondent-State.

Coram: R.M.S. Khandeparkar, J.
Dated: 15th December, 2005

JUDGMENT:

1. Heard. Rule. By consent, the rule is made returnable forthwith.

2. Few facts relevant for the decision are that the original plaintiff Maruti Raghunath Kadam filed Suit No.95/108 of 1993 in the Court of Small Causes under Section 41 of the Presidency Small Cause Courts Act, 1882 in respect of the suit premises contending therein that the original defendant Mangatram Anantrao Mane was his gratutious licensee. On 17-1-2000 the said suit was decreed ex parte and direction for possession of the suit premises was issued in favour of the original plaintiff. Thereafter the original plaintiff filed Miscellaneous Notice No.148 of 2000 for execution of the said decree which was made absolute and the plaintiff was allowed to execute the decree. When the plaintiff tried to execute the decree on 21-1-2001, the petitioners obstructed the execution. In view thereof,

the original plaintiff took out Obstructionist Notice No.18 of 2001 under the provisions of Order 21, Rule 97 of the C.P.C. which was opposed by the petitioners. The learned Judge of the Small Causes Court dismissed the said obstructionist notice on 22-1-2003 holding that the decree passed in the suit was not binding on the petitioners since the decree was passed by the Court without jurisdiction in view of the decision of this Court in **Ramesh Dwarkadas Mehra & others v. Indravati Dwarkadas Mehra & others,** reported in 2001 (4) Bom.C.R. 417. The original plaintiff preferred Appeal No.308 of 2003 before the Division Bench of the Small Causes Court. After hearing the arguments therein, the matter was reserved for judgment and the appeal was disposed of on 12-3-2004 while allowing the appeal and making the Obstructionist Notice No.18 of 2001 absolute. It was held by the Division Bench of Small Causes Court that the judgment of the Division Bench in the case of **Ramesh Dwarkadas Mehra** (supra) was delivered after the decree was passed in the suit and hence the decree had attained finality prior to the said decision in Ramesh Dwarkadas Mehra's case and when the decision was passed by the Small Causes Court it had jurisdiction to entertain and try the suit between the licensor and the gratuitous licensee and it was not without jurisdiction. Aggrieved by the said order, the petitioners preferred the present writ petition. Meanwhile, the original plaintiff had expired on 2-3-2004 and his legal representatives are

already on record having joined as the respondents.

3. The contention of the petitioners is that this Court in the case of Ramesh Dwarkadas Mehra had clearly declared the law that the suit by the licensor against the gratuitous licensee is not tenable before the Small Causes Court under Section 41 of the Presidency Small Cause Courts Act and such a suit should be filed before the Civil Court i.e. the City Civil Court or the High Court, depending upon the valuation. Though the decision was delivered on 2-5-2001, much after the decree in question, it declares the law regarding the jurisdiction of the Court to entertain the suit between the licensor and the gratuitous licensee and therefore it would relate back to the date of enforcement of the law. It would mean that the said law was always in existence right from the inception and therefore the decree which was passed by the Small Causes Court inspite of the said law was without jurisdiction and therefore a nullity and the issue of nullity of a decree can be raised at any point of time and therefore the petitioners were entitled to obstruct the execution of the said decree which was a nullity. The lower Appellate Court having totally ignored this aspect, erred in interfering with the order passed by the learned single Judge of the Small Causes Court. In support of his contention, Shri G.S. Godbole, learned Advocate appearing for the petitioners, sought to rely

upon the decisions in the matters of **Kiran Singh and others v. Chaman Paswan and others,** reported in AIR 1954 SC 340, **Chiranjilal Shrilal Goenka (Deceased) through LRs. v. Jasjit Singh and others,** reported in (1993) 2 SCC 507, **Sushil Kumar Mehta v. Gobind Ram Bohra (Dead) through his LRs,** reported in (1990) 1 SCC 193 and **Most. Rev.P.M.A. Metropolitan & Ors. Etc.Etc. v. Moran Mar Marthoma & Etc.Etc.,** reported in JT 1995 (5) SC 1.

4. Shri A.A. Kumbhakoni, learned Advocate appearing for the respondents, on the other hand, submitted that at the relevant time the law, as declared by this Court, did disclose that suits against gratuitous licensees were covered by Section 41 of the Presidency Small Cause Courts Act, 1882 and therefore the Small Causes Court had jurisdiction. Besides, in such cases the principle of prospective overruling would apply and though in the normal circumstances it is to be invoked by the Apex Court, considering the provisions of Article 226 of the Constitution of India, nothing would prevent this Court in applying the same principle in relation to the local Acts, apart from the fact that the judgment delivered by the Division Bench in Ramesh Dwarkadas Mehra's case itself discloses that the Court intended to apply the said law to the suits filed subsequent to the judgment by the Division Bench and not to those already filed. Reliance was sought to be placed in the decisions of

Kailash Chand Sharma v. State of Rajasthan and others, reported in (2002) 6 SCC 562, **Ganga Ram Moolchandani v. State of Rajasthan and others,** reported in (2001) 6 SCC 89, **Harsh Dhingra v. State of Haryana and others,** reported in (2001) 9 SCC 550, **Somaiya Organics (India) Ltd. and another v. State of U.P. and another,** reported in (2001) 5 SCC 519, **Sarwan Kumar and another v. Madan Lal Aggarwal,** reported in (2003) 4 SCC 147, **Bharmappa Nemanna Kawale and another v. Dhondi Bhima Patil and others,** reported in (1996) 8 SCC 243 and **Maria Sera Pinto v. Milton Dias,** reported in 2001 (1) Bom.C.R. 585.

5. The decision of the Division Bench in Ramesh Dwarkadas Mehra's case is clearly to the effect that the a suit by a licensor against a gratuitous licensee is not tenable before the Presidency Small Causes Court under Section 41 of the Presidency Small Cause Courts Act, 1882 and such a suit should be filed either in the City Civil Court or in the High Court, depending upon the valuation of the suit. Obviously, the law on the point of jurisdiction of the Small Causes Court to entertain any such suit between a licensor and a gratuitous licensee is well-settled to the effect that the Small Causes Court has no jurisdiction to entertain such suits. Once it is held that the Small Causes Court has no jurisdiction to entertain such suit, any such suit entertained and a decree or any order passed in

such a suit between a licensor and a gratuitous licensee by the Small Causes Court would be a sheer nullity and it can have no legal consequences or effect and any such decree or order passed would be ab initio bad in law. A decree which is a nullity is never executable under the provisions of law. Whenever any attempt is made to execute any such decree, any aggrieved person can obstruct the execution of such a decree and the issue regarding nullity can be raised and dealt with by the executing Court. The law on this point is well-settled. The Apex Court in **Kiran Singh's** case (supra) had clearly ruled that it is a fundamental principle that a decree passed by a Court without jurisdiction is a nullity, and its invalidity can be set up whenever and wherever it is sought to be enforced or relied upon and even at the stage of execution or even in collateral proceedings because a defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by the consent of the parties.

6. Similarly, in **Chiranjilal Shrilal Goenka's** case (supra), the Apex Court had held that a decree passed by a Court without jurisdiction on the subject-matter or on the grounds on which the decree made which goes to the root of its jurisdiction or lacks inherent jurisdiction

is a coram non judice. A decree passed by such a Court is a nullity and is non est. Its validity can be challenged whenever it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings. Same view has been reiterated in **Sushil Kumar Mehta's** case (supra).

7. In **Most. Rev.P.M.A. Metropolitan's** case (supra) it was ruled that even in the Supreme Court a plea regarding lack of jurisdiction to the trial Court to entertain a proceedings can be raised when the decree is passed without jurisdiction and as such the decree is non est in law.

8. It is thus clear that once it is shown that the decree was passed without jurisdiction as the dispute between the licensor and the gratuitous licensee could not be adjudicated by the Small Causes Court, and it was required to be adjudicated upon by the City Civil Court, the decree passed by the Small Causes Court in that regard would be a decree without jurisdiction and therefore non-enforceable, it being a nullity. Since the said issue was raised by the petitioners while obstructing the execution of the decree, the learned single Judge of the Small Causes Court was justified in dismissing the obstructionist proceedings and the Division Bench of the Small Causes Court was clearly in

error in allowing the appeal and making the obstructionist proceedings absolute.

9. The contention sought to be raised on behalf of the respondents that the decision in Ramesh Dwarkadas Mehra's case should be held to be prospective and the law at the relevant time empowered the Small Causes Court to entertain the suit between the licensor and the gratuitous licensee is devoid of substance. Once this Court has declared the law regarding the jurisdiction of the trial Court in relation to a particular subject, such a declaration would be effective right from the inception and not merely from the date of declaration. A declaration would mean that the Small Causes Court had never any jurisdiction to entertain any such suit between a licensor and a gratuitous licensee. Any order or decree passed in that regard would be a nullity and non-executable. Needless to say that in cases where the decree has already been executed prior to the declaration of law on the point of jurisdiction by this Court, and the proceedings between the parties are not pending nor the right to proceed had been subsisting on the said day of declaration of law, would not be affected but certainly, but all other cases would be covered by the law declared by this Court. It will also apply to the pending proceedings as well as even to those which are concluded but the decree having not been executed.

10. As regards the theory of prospective overruling, the Apex Court in **Kailash Chand Sharma's** case (supra) clearly held that the same is to be invoked by the Apex Court in view of the provisions comprised under Articles 141 and 142 of the Constitution of India. Similar is the observation in **Ganga Ram Moolchandani's** case (supra). The ruling in **Harsh Dhingra's** case (supra) is also not different. Likewise are the views expressed in **Somaiya Organics (India) Ltd.'s** case (supra).

11. The decision in **Sarwan Kumar's** case (supra), rather than rendering any assistance to the respondents, it fortifies the view which I am taking in the matter. Therein it was clearly ruled that in the absence of any direction by the Apex Court that the rule laid down by the Apex Court would be prospective in operation, the finding recorded by the High Court that the rule would be applicable to the cases arising from the date of the judgment of the Apex Court cannot be accepted, same being erroneous. It was also held therein that the decree passed by the civil Court lacking inherent jurisdiction to entertain suit in view of the specific bar contained in the special Act governing the case would be a nullity and the objection regarding invalidity of such decree can be raised at a later stage including the stage of execution of the decree or in other collateral proceedings.

12. In **Bharmappa Nemanna Kawale's** case (supra), the execution of the decree for eviction was sought to be obstructed by raising a plea of want of jural relationship. Noting that no such point was ever raised, it was held that it was not open to contend at the execution stage that he is still the tenant under the Tenancy Act and therefore the decree is a nullity. It appears that there was a suit filed for eviction of the party wherein no plea regarding the Bombay Tenancy and Agricultural Lands Act was ever raised and no issue of absence of jurisdiction to the civil Court was raised before passing the decree. Such a plea was sought to be raised only during the execution of the decree. As the executing Court had no jurisdiction to deal with the said issue and it would amount to going beyond the decree and unless there is a finding about the relationship of the plaintiff and the defendant to be an agricultural tenant, there was no occasion to presume the existence of such relationship which would oust the jurisdiction of the civil Court and obviously considering the same it was held that there was no substance in the objection in those set of facts. The decision is of no help to the respondents.

13. The decision in **Maria Sera Pinto's** case (supra) is also of no help to the respondents. Therein the Court while pronouncing the law itself has held that the

decision would apply to the pending cases in particular circumstances enumerated under the decision whereas in respect of the cases yet to be decided the declaration on the point of law would not apply. That was a declaration given by the Court while declaring the law itself and not in some other case. Being so, the same is also of no help to the respondents.

14. In the facts and circumstances of the case, therefore, the petitioners are justified in contending that the Small Causes Court had no jurisdiction to entertain the suit and to decree the same and therefore were justified in raising objection to the execution of the decree and hence the order passed by the Division Bench of the Small Causes Court cannot be sustained and is liable to be set aside.

15. The petition, therefore, succeeds and the same is allowed. The impugned order passed by the Appellate Body of the Small Causes Court is hereby set aside and the order dated 22-1-2003 of the single Judge of Small Causes Court dismissing the obstructionist proceedings is hereby confirmed. Rule made absolute accordingly.

No order as to costs.